In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1260

PEPPERELL MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A25-30) is reported at 403 F. 2d 520. The Board's decision and order (Pet. App. A8-20) are reported at 166 NLRB No. 24.

JURISDICTION

The judgment of the court of appeals (Pet. App. A32) was entered on December 2, 1968, and a peti-

tion for rehearing was denied on January 21, 1969 (Pet. App. A52). The petition for a writ of certiorari was filed on April 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the Board properly overruled the employer's objections to a representation election without holding an evidentiary hearing, upon finding that the objections presented no material issues of fact.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. A1-7.

STATEMENT

A. The Representation Proceedings

Pursuant to a stipulation of the parties a representation election was held at the Pepperell Manufacturing Company's plant in Lindale, Georgia on March 5, 1965. The union [1] lost the election and filed objections with the Board's Regional Director, alleging that the company had threatened the employees with a plant shutdown, layoffs, and a refusal to sign any agreement, should the union win the election (R.

[1] Textile Workers Union of America, AFL-CIO.

32-33).[2] The Board set the matter down for hearing (R. 56).[3] The hearing examiner found that the company had made threats to approximately 51 employees that it would shut down the plant if the union prevailed, and had waged an intensive campaign which stressed the inevitability of economic loss following unionization (R. 46-47). The Board set aside the election (R. 59) and a second election was scheduled for August 4, 1966 (R. 64).

The union won the second election (R. 67) and the company filed objections. It contended that in its leaflets the union had deliberately misrepresented the profit picture of the textile industry, the wages received by unionized employees in other industries in the area, and the provisions of the company's pension plan. The company also contended that the union, in its propaganda, had named a neighboring Teamsters local as endorsing its campaign when that local had not authorized the use of its name, and that the union had falsely stated that the company intended to lay off certain employees (R. 74-78).

After an administrative investigation of the company's objections, the Regional Director found that: (1) the leaflet concerning layoffs was labeled "Our Prediction" and, as such, "constitute[d] legitimate campaign propaganda" (R. 95); (2) even if the Teamster local had not authorized use of its name, there

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[2] "R" references are to the transcript of record in the court below.

[3] See 102.69(c) of the Board's Rules & Regulations, 29 C.F.R. 102.69(c).

was no impairment of employee free choice, since the benefits received by that local's members were accurately stated and the local knew the information it provided would be used in the election campaign (R. 84-88); (3) even if the profits in the textile industry were misstated, the matter was *de minimis*, since the company's *own* profits were not misrepresented, and, further, the company had about two weeks to reply to this leaflet (R. 92-93); (4) any inaccuracies as to the wages of unionized employees in the area "could only have had a *de minimis* effect * * * [as] it is clear that the employees referred to in the ad were employed in industries different than the Employer * * * [and] there was no claim that the [union] had itself obtained the benefits for the employees referred to in the ad * * *" (R. 90); and (5) "assuming [the union's] assertions with respect to the pension plan were false, it is manifest that the Employer had an opportunity to counter such assertion, when the first attack on the pension was made on July 20" (R. 94). The Regional Director concluded that the company's objections should be overruled and the union certified (R. 97).

The company filed exceptions to the Regional Director's report with the Board, contesting his conclusions and his failure to order a hearing on the objections (R. 100-109). The Board upheld the Regional Director, concluding that, "Even considering the 'totality' of [the union's] conduct herein, as requested by the Employer, we do not find sufficient warrant for setting aside the election" (R. 112, n. 2). The Board added: "With respect to * * * certain al-

leged misrepresentations of wage rates of union employees * * *, we note that the said information was first disseminated on July 31, 1966, and was merely repeated on August 3. Thus, there was ample time for an Employer reply before the election * * *. Further, the wage information was not such as fell within the special knowledge of the [union]" (R. 112-113). Accordingly, the Board certified the union as the employees' representative (R. 113).

B. The Unfair Labor Practice Proceeding

The company refused to bargain, and an unfair labor practice complaint issued. The trial examiner granted the General Counsel's motion for summary judgment, finding that there were no issues that had not been decided in the representation proceeding and no new evidence (Pet. App. A13-14). The Board adopted the trial examiner's decision, holding that the company had violated Section 8(a)(5) and (1) of the Act, and ordered the company to bargain with the union upon request (Pet. App. A8-9, 17-18).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. A30).

ARGUMENT

The first question posed by petitioner (Pet. 2)—whether "a formal hearing [must] be afforded a party * * * where disputed issues of material fact are shown to exist"—is not presented on this record. As shown above, the Board accepted the company's primary factual allegations as true, but found that they

did not warrant setting the election aside.[4]

Thus, the only question presented is whether the Board reasonably concluded that the union's alleged misstatements did not interfere with the employees' free choice in the election. The Board's conclusions were reasonable, as the court of appeals found, and there is no reason for this Court to review them further. Contrary to petitioner's assertion, the question whether the conduct assumed to have occurred warranted a setting aside of the election was primarily a matter for the sound discretion of the Board. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. Thus, the court of appeals applied the correct standard of review in this case.

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[4] Petitioner's contention that there was a controversy over its ability to make timely reply to the union's wage misrepresentation (Pet. 5) is really a quarrel with the conclusion which the Board drew from the undisputed facts in the record. Thus, the Board held that four days were sufficient for the company to ascertain the facts, where, as here, they were not within the peculiar knowledge of the union (*supra*, pp. 4-5). The company's affidavit does not controvert this conclusion; it merely discloses that the company did not make a concerted effort to obtain the facts until the leaflet reappeared on the day before the election and that they were readily available when that effort was made (R. 154, 171-175).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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